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## A TEMPORARY OCCUPANT OF NO. 10?

### Prime ministerial succession in the event of the death of the incumbent

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*~ Cabinet, conventions, Deputy Prime Minister, Prime Minister, royal prerogative, Prime Ministerial succession*

The Prime Minister in the United Kingdom is head of government. He is the sovereign's principal minister, chair of the Cabinet, and the nation's representative at various international gatherings, including the European Council.<sup>1</sup> Who holds the office matters for the purpose of the direction of government and the formulation of public policy. The method by which a politician becomes Prime Minister therefore matters. Prime ministerial succession is usually determined by an established and accepted process. This article addresses an exception. We begin by addressing the process that is established, before addressing the exception and why it merits attention.

### Selecting the Prime Minister

The formal constitutional position for the choice of Prime Minister is clear. The selection is in the gift of the sovereign. Indeed, the choice of Prime Minister is the last remaining prerogative power that the sovereign is not required to exercise on formal advice.<sup>2</sup> 'When the head of a Government resigns, or

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\*I am grateful to Lord Armstrong of Ilminster, Lord Butler of Brockwell, Lord Turnbull and the journal's anonymous reviewer for valuable comments on a draft of this article.

<sup>1</sup> See, for example, Lord Blake, *The Office of Prime Minister* (Oxford: Oxford University Press, 1975), Bernard Donoughue, *Prime Minister* (London: Jonathan Cape, 1987), Michael Foley, *The Rise of the British Presidency* (Manchester: Manchester University Press, 1993), Peter Hennessy, *The Prime Minister* (London: Allen Press/The Penguin Press, 2000).

<sup>2</sup> The other power that fell in this category until 2011 was that to dissolve Parliament. This prerogative power was superseded by the Fixed-term Parliaments Act 2011 which stipulates the dates of general elections and the

is defeated in Parliament', wrote Harold Nicolson in 1952, 'the choice of his successor devolves upon the King alone. He is obliged to exercise the Prerogative on his own responsibility, since there no longer exists a Prime Minister by whom he can be advised.'<sup>3</sup>

In practice, prerogative powers are constrained by political as well as practical circumstances. The exercise of many of the sovereign's powers is constrained by convention.<sup>4</sup> Constitutional conventions are the means by which the gap between formal provisions of the constitution and political reality is bridged.<sup>5</sup> It is a convention that the sovereign selects as Prime Minister the leader of the political party which has an absolute majority in the House of Commons or who can command such a majority. There are potential complications if no one party commands a clear majority. In such a situation, negotiations may take place, as happened in May 2010 following an inconclusive general election, between party leaders to reach agreement and that agreement conveyed to Buckingham Palace. The Queen would then summon the person agreed upon as the leader of the new government (in the case of a coalition presumably the leader of the major partner in the coalition) to kiss hands as Prime Minister. There is no requirement for the parties to enter into negotiations. *The Cabinet Manual*, published in 2011, drawing together rules and procedures under which government operates, expresses it in permissive rather than mandatory form (may rather than should).<sup>6</sup> However, if negotiations do take place, it is expected that the party leaders will reach agreement through their own endeavours, if necessary aided by civil service resources, but without requiring any independent

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conditions under which early elections may be called. As the explanatory notes to the Act make clear, the Queen retains no residual power to dissolve Parliament.

<sup>3</sup> Harold Nicolson, *King George The Fifth* (London: Constable & Co., 1952), p. 375.

<sup>4</sup> See Geoffrey Marshall, *Constitutional Conventions* (Oxford: Oxford University Press, 1984), especially pp. 29-35 relating to the appointment of a Prime Minister. As he notes at p. 29, 'The legal freedom of choice has always in modern times been encrusted with convention.'

<sup>5</sup> See David Feldman, 'Constitutional Conventions', in Matt Qvortrup (ed), *The British Constitution: Continuity and Change* (Oxford: Hart Publishing, 2013), and Joseph Jaconelli, 'Continuity and Change in Constitutional Conventions', also in Qvortrup, *The British Constitution: Continuity and Change*.

<sup>6</sup> *The Cabinet Manual*, 1<sup>st</sup> edn (London: Cabinet Office, 2011), para. 2.13, p. 15.

judgment to be exercised by the sovereign. As the *Manual* puts it, ‘The Sovereign would not expect to become involved in any negotiations’, though there are responsibilities of those involved to keep the Palace informed of what is happening.<sup>7</sup>

There is thus normally no problem when a Prime Minister announces that he (or she) intends to resign or a general election results in the Opposition winning an absolute majority. The Queen in the former case awaits the election of a new leader by the incumbent party in government, whereupon she receives the resignation of her outgoing Prime Minister and then receives the new leader to ask him or her to form a government. In the latter case, the premier tenders his resignation, once the outcome of an election is clear, and the leader of the victorious party summoned to Buckingham Palace.<sup>8</sup> If there is uncertainty as to the outcome, as in 2010, it is expected (though there is no formal obligation) that the incumbent will remain in office until negotiations are complete. This again is now embodied in *The Cabinet Manual*.

Most eventualities are thus catered for. However, there is one that is not. There is no convention to determine what happens if a Prime Minister dies. Prior to the 20<sup>th</sup> Century, no convention was needed. There were no elected party leaders and there was no political imperative for the Prime Minister to be appointed immediately upon the demise of the incumbent. Seven did die in office, the most dramatic being as a consequence of assassination (Spencer Perceval in 1812) and the most recent being Lord Palmerston in 1865. There was a gap of almost a month before Lord Liverpool was appointed as Perceval’s successor and Lord John Russell was not appointed until eleven days after Palmerston’s demise.<sup>9</sup>

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<sup>7</sup> *The Cabinet Manual*, para. 2.13, p. 15.

<sup>8</sup> It used to be the practice that the Prime Minister faced the new House of Commons and tendered the Government’s resignation upon being defeated in a vote of confidence. The last occasion this happened was on 21 January 1924 when the Government of Stanley Baldwin was defeated.

<sup>9</sup> Comprehensive data on Prime Ministers’ tenures of office are to be found in Dermot Englefield, Janet Seaton and Isobel White, *Facts About the British Prime Ministers* (London: Mansell, 1995).

However, since Palmerston's demise, two developments have effectively collided with one another or at least created a conundrum for the sovereign and her advisers. The first has been the gradual detachment of the sovereign from political activity. The position came increasingly to rest on being above the partisan fray. It was, in effect, a case of strength through weakness.<sup>10</sup> By acting on the basis of precedent or established guidance, and hence acting in a manner that involved no personal judgment, the sovereign was able to act as a politically neutral head of state, representing the unity of the nation. As Frank Hardie observed, 'Since 1901, the trend toward a real political neutrality, not merely a matter of appearances, has been steady, reign by reign'.<sup>11</sup> Though sovereigns in the 20<sup>th</sup> Century had on occasion to choose between contending candidates for the premiership – George V in 1923 and Queen Elizabeth II in 1957 and 1963 – they were not exercising a personal preference, but acting on advice or, in George V's case, a constitutional principle. The King shared the view of advisers who believed that 'in a Parliament in which Labour constituted the largest Opposition Party, the Prime Minister must be a Member of the House of Commons.'<sup>12</sup> The last sovereign to exercise a clear personal preference was Queen Victoria in sending for Lord Rosebery in 1894.

The other development has been changes in the way that political parties select their leaders. In the 19<sup>th</sup> Century, neither the Liberal Party nor the Conservative Party had a mechanism for electing the leader upon the retirement of the incumbent.<sup>13</sup> It was the usual practice for the sovereign's choice of Prime Minister to be endorsed by a party gathering. It was also usual for a Prime Minister to continue as party leader if the party went into opposition. However, if there was no former Prime Minister (be it through death or retirement) the party in each House elected its own leader. This was the practice

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<sup>10</sup> Philip Norton, *The British Polity*, 5<sup>th</sup> edn (New York: Longman, 2010), p. 363.

<sup>11</sup> Frank Hardie, *The Political Influence of the British Monarchy* (London: Batsford, 1970), p. 188.

<sup>12</sup> Nicolson, *King George The Fifth*, p. 376. The Labour Party was effectively unrepresented in the House of Lords at that time.

<sup>13</sup> The only election by Members took place by Irish Nationalist MPs, who elected a chairman.

adopted by the Liberal Parliamentary Party until its split in the second decade of the 20<sup>th</sup> Century and was formally the practice adopted by the Conservative Party until 1965.

In the 20<sup>th</sup> Century, the method of choosing the leader underwent two major changes. The first was the election of the party leader by the party's MPs. From its inception in 1906, the Parliamentary Labour Party (PLP) elected a chairman. In 1922, when the party became the official Opposition, the chairman, Ramsay MacDonald, was designated as 'chairman and leader', becoming Leader of the Opposition and, in 1924, Prime Minister.<sup>14</sup> Election of the chair of the PLP thus became effectively the election of the leader. In Government, the annual election was suspended, although a chairman continued to be elected. Labour MPs thus became the electorate for choosing the party leader.

Between 1922 and 1980, there were eight contested elections.

The Parliamentary Liberal Party after the First World War moved to electing a chairman and in 1935, after some confusion,<sup>15</sup> to electing the leader. The Conservative Party was the latecomer to election. The party relied upon a successor to the leader to 'emerge'. There was usually an heir apparent and, if not, as in 1923, the party was content to endorse the sovereign's choice. Relying on emergence avoided a potentially bruising election and allowed for the strength of opposition to a particular candidate to be taken into account.<sup>16</sup> The process generally served its purpose, but came into disrepute in 1957 and 1963, when no obvious successor emerged to Anthony Eden and Harold Macmillan respectively on their resignations as Prime Minister. Although on both occasions the Queen acted on advice, there was the potential to be drawn into political controversy through exercising a choice between contending candidates. The 1963 contest was especially bruising.<sup>17</sup> To

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<sup>14</sup> Philip Norton, 'The Organization of Parliamentary Parties', in S. A. Walkland (ed), *The House of Commons in the Twentieth Century* (Oxford: Clarendon Press, 1979), pp. 50-1.

<sup>15</sup> See Jorgen Rasmussen, *The Liberal Party* (London: Constable, 1965), p. 40.

<sup>16</sup> Norton, 'The Organization of Parliamentary Parties', p. 55.

<sup>17</sup> See, for example, Alistair Horne, *Macmillan 1957-1986* (London: Macmillan, 1989), pp. 527-66.

avoid a repetition, the party in 1965 introduced a method of election. The electorate was confined to MPs, utilising eliminating ballots until a candidate achieved the required margin of victory.<sup>18</sup>

The second change was the extension of the electorate to all party members. The Liberal Party widened the franchise for electing the leader to the entire party membership in 1976. The Labour Party did so in 1981, election passing to an electoral college comprising three elements – the parliamentary party, constituency parties, and trade unions.<sup>19</sup> The Conservative Party followed in 1998. Party leader William Hague, elected by the depleted ranks of Tory MPs following the 1997 general election, achieved party agreement to opening the election to the entire party membership.<sup>20</sup> In the event of more than two candidates standing, Conservative MPs reduce the number through eliminating ballots to two and the party membership then make the choice between them.

All three main parties thus elect their leader and the electorate is the party membership. The relevance for our purposes is twofold. The first is that election of the party leader has effectively constrained the sovereign's prerogative. The second, and more germane for our purposes, is that, if a leader retires, a process is set in train for the party to elect a successor. This takes time. Even under election by MPs, with eliminating ballots, it was not necessarily a short process. With election by the party membership, it is an even more time-consuming process. In 2001, for example, the election of a

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<sup>18</sup> To be elected, a candidate required an absolute majority and for the winning margin to represent at least 15% over any other candidate. New candidates could enter the race after the first ballot if no candidate achieved the necessary margin to be elected. Further changes were agreed in January 1975, the principal one being the annual election of the leader, with the winning candidate now requiring a 15% margin of all Conservative MPs and not simply those voting. Other changes were agreed following the failure of Prime Minister Margaret Thatcher to be re-elected as party leader.

<sup>19</sup> The trade unions counted for 40% and the other two parts 30% each. In 1993, trade unions and constituency parties were required to ballot members individually and the weighting between the three elements changed to one-third each. The rules were changed following a review in 2014, the party adopting a one member, one vote system, with no weighting between the sections of the party. A candidate needs to receive the nominations of 15% of members of the PLP in order to be on the ballot.

<sup>20</sup> See Tim Bale, *The Conservative Party from Thatcher to Cameron* (Cambridge: Polity, 2010), pp. 74-5.

Conservative leader in succession to William Hague – entailing three ballots of Conservative MPs and a national campaign by the two remaining candidates – took three months.<sup>21</sup>

The time-consuming aspect of election has not proved problematic in ensuring continuity of leadership in that the existing leader has remained in office until a new leader has been chosen. Indeed, a precedent was set on the Conservative side before election was introduced. Harold Macmillan in 1963 announced his intention to resign, but remained in office while the Conservative Party's 'customary processes of consultation' were held, no obvious heir apparent being in place to be summoned immediately to the Palace. As Harold Wilson observed, Macmillan was ill, but the Queen's Government had to be carried on 'and an immediate resignation would have forced an extremely hasty decision'.<sup>22</sup> Wilson was the first under conditions of election to ensure an orderly succession, announcing in March 1976 his intention to resign, but only tendering his resignation the following month once Labour MPs had elected James Callaghan as party leader. Margaret Thatcher continued as Prime Minister until the party's MPs had elected John Major as her successor. Tony Blair remained in No. 10 until the processes of electing his successor were complete. This maintains the convention that the sovereign's prerogative power becomes live only if and when the office of Prime Minister is vacated by the decision of the incumbent (or presumably by the incumbent's death), and the principle that the incumbent in No. 10 remains in office until he or she is in a position to recommend a successor who is ready and able to form a government, preferably one which can command a majority in the House of Commons.

The fact that there has been no problem to date with the succession from one premier to another following the practice of electing the party leader disguises a potential problem. The neutrality of the sovereign in choosing a Prime Minister and the time-consuming element of electing a party leader

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<sup>21</sup> Philip Norton, 'The Conservative Party: The Politics of Panic', in John Bartle and Anthony King (eds), *Britain at the Polls 2005* (Washington DC: CQ Press, 2006), pp. 34-38.

<sup>22</sup> Harold Wilson, *The Governance of Britain* (London: Sphere Books, 1977), p. 58.

come into tension in one circumstance. If the Prime Minister dies, there is no longer a Prime Minister to remain in post until a successor is elected. What, then, happens?

Conservative MP Peter Bone has queried on a number of occasions in the House of Commons who would succeed the Prime Minister in the event of the incumbent's incapacity.<sup>23</sup> The questions have not addressed who would determine incapacity, but rather take as given circumstances where the incapacity was clear. In the event, the distinction between incapacity and death has no bearing on the response, as ministers have consistently avoided offering a direct answer. The Leader of the House of Commons, Sir George Young, replied that 'I see no prospect whatever in the near future of my right hon. Friend the Prime Minister becoming incapacitated'.<sup>24</sup> The Deputy Prime Minister, Nick Clegg, in answer to a written question, stated that 'The Prime Minister remains Prime Minister at all times but arrangements, appropriate at the time, would be put in place if necessary, as has been the practice under successive Administrations.'<sup>25</sup> This appeared directed more at the fact that there are instances in which Prime Ministers delegate specific duties to other ministers in the event of their inability to act. It was not concerned directly with the process by which someone would take over the reins as Prime Minister.

We address what would happen in the event of the Prime Minister's death. The answers to Peter Bone's questions mask the fact that the need to have some understanding in place to govern the sovereign's action in such an event is one that has been recognised by the principal officials in both Downing Street and Buckingham Palace. As we shall see, it has exercised the minds of a number of Cabinet Secretaries as well as the Queen's Private Secretary. This stands in stark contrast to academic interest, which has been close to non-existent. Though the occasional text has touched upon what

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<sup>23</sup> *HC Deb.* Vol. 514, col. 570 (22 July 2010), *HC Deb.* 523, col. 922W (17 Feb. 2011), *HC Deb.* Vol. 524, col. 471 (3 March 2011), *HC Deb.* Vol. 537, col. 940 (15 Dec. 2011).

<sup>24</sup> *HC Deb.* Vol. 514, col. 570 (22 July 2010).

<sup>25</sup> *HC Deb.* Vol. 523, col. 923W (17 February 2011).



may happen upon the demise of the Prime Minister,<sup>26</sup> the only sustained study has been that undertaken by Andrew Vennard, published in *Public Law* in 2008.<sup>27</sup> His article provides a valuable study of practice in other countries when the post of Prime Minister or head of government becomes vacant by reason of death or incapacity and addresses the need to agree procedures to govern the eventuality in the UK. He proffers a possible protocol. In the event, his thoughts had been anticipated some years previously by those charged with ensuring the smooth running of British government.

### **Does it matter?**

Successive Cabinet Secretaries have been acutely conscious of the problem that may derive from the untimely demise of the Prime Minister. There are two elements to this. One is the actual possibility of such an occurrence. The other is the absence of certainty as to who would acquire the keys to No. 10, albeit potentially on an interim basis.

The question of what would happen if the Prime Minister dies arose in dramatic form in the early hours of 12 October 1984, when a bomb exploded in the Grand Hotel in Brighton, housing the Prime Minister, Margaret Thatcher, and various members of the Cabinet during the Conservative Party Conference. The purpose was clear. As Mrs Thatcher observed in the wake of the explosion, ‘I think that was an assassination attempt, don’t you?’<sup>28</sup>

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<sup>26</sup> As, for example, A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, 14<sup>th</sup> edn (London: Longman, 2007), p.248-9; Rodney Brazier, *Constitutional Practice*, 2<sup>nd</sup> edn (Oxford: Oxford University Press, 1994), pp. 12-13.

<sup>27</sup> Andrew Vennard, ‘Prime Ministerial Succession’, *Public Law*, Summer 2008, pp. 302-22.

<sup>28</sup> Ronald Millar, *A View from the Wings* (London: Weidenfeld & Nicolson, 1993), p. 301.

News of the bombing was reported by the broadcast media and heard by the Cabinet Secretary, Sir Robert Armstrong. There was a gap, ‘about half an hour’, between him hearing the news and receiving a ‘phone call from the Prime Minister’s principal private secretary, Robin Butler, letting him know that the Prime Minister was uninjured.’<sup>29</sup>

In that short interval between getting the news of the bombing and hearing that the Prime Minister was alive, Armstrong had given thought to what he should do in the event that the Prime Minister had been killed:

It was immediately clear that arrangements would need to be made immediately, with a minimum of delay, for the appointment of a ‘stop-gap’ Prime Minister to form an administration to hold office and carry on the government until Mrs Thatcher’s successor as Leader of the Conservative Party had been chosen.<sup>30</sup>

That was not the only occasion that gave rise to such reflection. There were various terrorist threats during the incumbency of Margaret Thatcher’s successor in No. 10, John Major. The most significant was on the morning of 7 February 1991 when the IRA attempted to kill the Prime Minister and other senior ministers. Three mortars were fired from a stolen van parked close to Downing Street.

Suddenly there was a tremendous explosion outside the Cabinet Office window.. ‘It’s a mortar’, I heard Tom King shout. Charles Powell put his hand on my shoulder and pushed me under the Cabinet table as the windows buckled in and everyone took cover. What sounded like two further muffled explosions followed – and then silence. As we rose from

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<sup>29</sup> Constitution Committee, House of Lords, *The Cabinet Manual*, 12<sup>th</sup> Report, Session 2010-11, HL Paper 107, Q67, p. 21.

<sup>30</sup> Lord Armstrong of Ilminster to author, 16 August 2007.

under the table, the building still seemed to be shaking. I could hear shouts and sirens in the distance.<sup>31</sup>

There is also a third occasion worthy of note, though in a very different context – the potential for the political, rather than the physical, death of the Prime Minister. An incumbent, as we have seen, normally stays in office until a successor is chosen.<sup>32</sup> However, a Prime Minister could opt to tender his or her resignation with immediate effect. In 2003, Prime Minister Tony Blair contemplated such a step. There was the prospect of the Opposition voting for a motion of no confidence in the event of the Government losing the key vote on military engagement in Iraq. If Labour rebels combined with the Tories and he lost, then, he recorded, ‘I would be out’.<sup>33</sup> As both Blair and his communications chief, Alastair Campbell, recorded, Cabinet Secretary Andrew Turnbull was exploring how a John Prescott caretaker premiership would operate.<sup>34</sup> There was no constitutional reason why Blair had to resign immediately, rather than stay in office in accordance with convention until a new Labour leader was elected, but it appears all options were being considered. The relevant point for our purposes is that the prospect of an interim Prime Minister was being considered.

What these occasions show is not only that the issue is a real one, most notably demonstrated in October 1984, but also that senior civil servants have been alert to what should happen in the event of the Prime Minister’s demise. Apart from the human element, there is a constitutional problem. There is no agreed mechanism for ensuring continuity.

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<sup>31</sup> John Major, *The Autobiography* (London: HarperCollins, 1999), p. 238.

<sup>32</sup> Some have accorded this the status of a convention, but this is not yet generally accepted. See Philip Norton, ‘From Flexible to Semi-Fixed: The Fixed-term Parliaments Act 2011’, *Journal of International and Comparative Law*, 1 (2), 2014, pp. 203-20.

<sup>33</sup> Tony Blair, *A Journey* (London: Hutchinson, 2010), p. 429.

<sup>34</sup> Alastair Campbell, *The Blair Years* (London: Hutchinson, 2007), p. 672; Blair, *A Journey*, p. 429. John Prescott was Deputy Prime Minister and First Secretary of State.

## **The absence of certainty**

On the face of it, there is nothing to guide the sovereign's actions in the event of the Prime Minister succumbing to a fatal heart attack or dying in an air crash or terrorist atrocity. It is one of the aspects of the appointment of the Prime Minister where, to use Colin Munro's term, 'convention becomes rather cloudy'.<sup>35</sup> Indeed, conventions essentially cease to apply. There is no longer a leader of the governing party. Nor is there anyone who automatically stands in line.

Although on occasion a minister has been styled as Deputy Prime Minister, the position is one that in constitutional terms is rather opaque. Marshall and Moodie refer to it as a 'dubiously respectable title',<sup>36</sup> neatly encapsulating its unusual status. It has been claimed that the position is 'unknown to the constitution', in effect rendering it – in the words of Margaret Thatcher's press secretary, Bernard Ingham – a courtesy title.<sup>37</sup> *The Cabinet Manual* is silent on the constitutional status of a Deputy Prime Minister, merely noting that 'The title of Deputy Prime Minister is sometimes given to a senior minister in the Government, for example the deputy leader of the party in government or the leader of a smaller party in a coalition.'<sup>38</sup> That is a statement of fact, but the use of the term 'title' is instructive. It is not referred to as a ministerial post. The position carries no salary, necessitating the holder being given an established ministerial office. In May 2010, for example, Nick Clegg was given the title of Deputy Prime Minister and appointed to the post of Lord President of the Council. The title of Deputy Prime Minister confers no right to deputise for the Prime Minister. The holder of the title may only deputise when the Prime Minister determines that the holder should do so.

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<sup>35</sup> Colin R. Munro, *Studies in Constitutional Law* (London: Butterworths, 1987), p. 58.

<sup>36</sup> Geoffrey Marshall and Graeme C. Moodie, *Some Problems of the Constitution*, 4<sup>th</sup> revised edn (London: Hutchinson University Library, 1967), p. 138.

<sup>37</sup> Bernard Ingham, *Kill the Messenger* (London: HarperCollins, 1991), p. 332.

<sup>38</sup> *The Cabinet Manual*, para. 3.11, p. 22.

The position is further complicated by the fact that some ministers do not formally hold the title of Deputy Prime Minister, but are nonetheless deemed to be the premier's deputy. When Prime Minister Andrew Bonar Law was taken ill in 1923, for example, it was arranged that in his absence 'Lord Curzon should act as deputy Prime Minister'.<sup>39</sup> Winston Churchill referred to Clement Attlee as 'now generally recognised as deputy Prime Minister'.<sup>40</sup> Harold Macmillan declined in 1962 to appoint a deputy, but later that year announced that R. A. Butler would act as deputy Prime Minister.<sup>41</sup> He avoided formally designating him as such and assuaged any resentment on Butler's part by creating the post of First Secretary of State. Butler had kept government running during 1953 when Churchill was felled by a stroke and Anthony Eden was also indisposed, who otherwise would have filled the role. Butler fulfilled the role again in late 1956 and early 1957 when Eden was out of the country. He held no formal designation as deputy Prime Minister on either occasion. William Whitelaw, Home Secretary and then Leader of the House of Lords under Prime Minister Margaret Thatcher, was generally acknowledged as deputy Prime Minister, but never held it as a title and was never referred to as such by Thatcher. As Home Secretary, he recognised he was a 'senior Cabinet minister',<sup>42</sup> and he stood in for the Prime Minister at Prime Minister's Question Time when she was absent,<sup>43</sup> but the only formal position as deputy he held was as deputy leader of the party.

The principal explanation for the apparent unwillingness to accord the position of Deputy Prime Minister that of an established Cabinet post is that it may be taken to constrain the sovereign's prerogative in the choice of Prime Minister. The title has no bearing on who would succeed the PM in the event of the premier's death. Curzon may have been acting as deputy Prime Minister during Bonar Law's illness, but when Bonar Law resigned a month later the King summoned Stanley

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<sup>39</sup> Nicolson, *King George The Fifth*, p. 375.

<sup>40</sup> Cited in Marshall and Moodie, *Some Problems of the Constitution*, p. 137.

<sup>41</sup> Wilson, *The Governance of Britain*, p. 37.

<sup>42</sup> William Whitelaw, *The Whitelaw Diaries* (London: Headline, 1989), p. 214.

<sup>43</sup> Whitelaw, *The Whitelaw Diaries*, pp. 217-8.

Baldwin rather than Curzon.<sup>44</sup> When Winston Churchill travelled out of the country in 1942, he nominated Anthony Eden – not the deputy Prime Minister Clement Attlee – to succeed him in the event of his death. In 1945, he advised that, should he and Eden both be killed, Sir John Anderson should be appointed. The advice was exactly that – the King was not obliged to accept it – but the fact that it was tendered indicates that there was no presumption on the part of the Prime Minister that his deputy had any right by virtue of his title automatically to succeed him.

Nor would the position necessarily entitle the holder to be a caretaker leader, someone who would take charge of government while a new leader was elected. Rodney Brazier has raised this possibility, suggesting that the Queen could ‘ask the Prime Minister’s deputy (if there were one), or the number two in the order of precedence in the Cabinet list (if there were no formal deputy), to take charge of the government, while retaining his portfolio, but *without* appointing him Prime Minister’.<sup>45</sup> There are two political objections to this proposal. The first is exemplified by what happened in May 2010. The deputy, or the minister who is number two in Cabinet rank, may not be of the same party as the PM. The Leader of the Liberal Democrat Party, Nick Clegg, was given the title of Deputy Prime Minister and was listed as number two in the Cabinet rankings.<sup>46</sup> As leader of a minority party in a coalition, he would probably not be acceptable to the Conservative parliamentary party, the dominant partner in the coalition, either to be Prime Minister or to take charge of government while a new Conservative leader was elected. The other objection is acknowledged by Brazier: the deputy or second most senior minister could be a contender for the leadership and running government during the contest could confer an unfair advantage over other contenders. Brazier makes the point that it

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<sup>44</sup> See Nicolson, *King George The Fifth*, pp. 375-9.

<sup>45</sup> Brazier, *Constitutional Practice*, p. 12 and n23.

<sup>46</sup> The ranking of Cabinet ministers is determined by the Prime Minister. The pecking order has limited practical relevance, other than that in any meeting between Cabinet ministers, the one that is the lower ranked calls upon the one that is more senior. Wilson, *The Governance of Britain*, p. 37.

could work to the deputy's disadvantage, in that he or she could make some political slip.<sup>47</sup> It is unlikely that other contenders for the office would concede the case on the basis of this particular possibility.

The sensitivity to the Queen's prerogative was reflected in the discussions surrounding the appointment of Sir Geoffrey Howe as Deputy Prime Minister in 1989. Having agreed to become Deputy Prime Minister, in addition to Leader of the House of Commons and Lord President of the Council, he was contacted by Charles Powell, the Prime Minister's private secretary:

The Palace, he said, had had a little difficulty in accepting the official description 'Deputy Prime Minister'. They were proposing to follow the precedent of Eden with Churchill and use the form of words: 'Sir Geoffrey will act as Deputy Prime Minister'. Was that all right?<sup>48</sup>

The status of the position was not enhanced when, as Kenneth Baker recorded, Bernard Ingham was asked what the post of Deputy Prime Minister entailed: 'In typically brusque fashion, Ingham was utterly dismissive, implying that the title meant nothing'.<sup>49</sup> But, as Baker noted, he was taking his cue from the Prime Minister 'who, eighteen months earlier, had said the post of Deputy Prime Minister was no longer needed'.<sup>50</sup>

Though the conferment of the title of Deputy Prime Minister is now not unusual, and the holder listed as Deputy Prime Minister in Cabinet rankings, the position in relation to the prerogative remains unchanged. The holder enjoys no entitlement to the keys to 10 Downing Street. As The Cabinet

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<sup>47</sup> Brazier, *Constitutional Conventions*, p. 13.

<sup>48</sup> Geoffrey Howe, *Conflict of Loyalty* (London: Macmillan, 1994), p. 590.

<sup>49</sup> Kenneth Baker, *The Turbulent Years: My Life in Politics* (London: Faber and Faber, 1993), p. 284. See Ingham, *Kill the Messenger*, p. 332, for the claim that he 'did not seek to diminish Sir Geoffrey's role'.

<sup>50</sup> Baker, *The Turbulent Years*, p. 284.

Manual points out, ‘The fact that a person has the title of Deputy Prime Minister does not constrain the Sovereign’s power to appoint a successor to the Prime Minister’.<sup>51</sup> If a minister is given the title of Deputy Prime Minister, the title accords status during the tenure of the incumbent Prime Minister, though even then the responsibilities given to the holder may be limited. (The Prime Minister may, for example, designate another minister to stand in at Prime Minister’s Question Time, or take charge of government, when the premier is away.) It has no significance, certainly no wider significance, beyond that incumbency. Thus, had Margaret Thatcher succumbed in 1989 to a terrorist attack, Howe’s status would not have fettered the sovereign’s choice.

Nor is the title of the Deputy Prime Minister the only one to be employed to signify seniority within government. As we have seen, Macmillan created the position of First Secretary of State, signifying the most senior Secretary of State, for Butler. The position was wound up in October 1963, but resuscitated by Harold Wilson the following year and held successively by George Brown, Michael Stewart and Barbara Castle. As the experience of Butler revealed, it could be seen as an alternative to conferring the title of Deputy Prime Minister. However, Michael Heseltine was given the title of Deputy Prime Minister and appointed First Secretary of State in 1995 as was John Prescott in 2001.<sup>52</sup> In the Parliament of 2010-15, there was both a Deputy Prime Minister (Nick Clegg) and a First Secretary of State (William Hague). The former was listed as number two in the Cabinet rankings, but the latter was the most senior Conservative minister after the Prime Minister. Each on occasion stood in for the Prime Minister at Prime Minister’s Question Time. Had the Prime Minister died, the Queen would have been under no obligation to invite either to form a government.

### **Devising a solution**

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<sup>51</sup> *The Cabinet Manual*, para. 3.11, p. 22.

<sup>52</sup> In the preceding Parliament (1997-2001), Prescott held the title while serving as Secretary of State for the Environment, Transport and the Regions.



Given the absence of a dedicated successor, who could be chosen? Both Robert Armstrong and Robin Butler addressed the issue in the 1980s in the light of experience. Following the Brighton bombing, Armstrong thought of what he would say to the Queen's Private Secretary, should his advice be sought in the event of the Prime Minister having been killed in the blast. He thought he would advise the Queen to send for William Whitelaw to form an administration until a new party leader could be elected, because he thought that Whitelaw, already regarded as effectively deputy Prime Minister, was the senior member of the Cabinet most likely to have the support of most of his Cabinet colleagues and was not likely, on age grounds and as a member of the House of Lords, to be a candidate in an election for the leadership of the Conservative Party. He recognised that the Private Secretary would consult others as well. 'I think it likely that a consensus would have developed round Willie Whitelaw. If so, the Queen would have sent for him, and he would have "kissed hands".'<sup>53</sup>

The threats to the life of the Prime Minister also exercised the mind of Robin Butler, who succeeded Armstrong as Cabinet Secretary in 1988. He saw Mrs Thatcher and told her that, in the event of the demise of the Prime Minister, someone would need to be agreed as interim leader, able to chair the Cabinet and advise the Queen, but not someone who was a contender for the post.

What I had in mind was that The Queen would invite someone to lead the Government while the party processes for election of a new leader took place. But that decision could itself be politically controversial since it might be regarded as giving the person chosen an advantage in the election. So it would be best to have some arrangement in place which would allow The Queen to be advised on this without the risk of bringing her into political controversy.<sup>54</sup>

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<sup>53</sup> Lord Armstrong of Ilminster to author, 16 August 2007.

<sup>54</sup> Lord Butler of Brockwell to author, undated.

He proffered the name of Lord Mackay as Clashfern, the Lord Chancellor, as a possible nominee. It is not clear, though, whether this was by virtue of Mackay being Lord Chancellor (and hence that the holder of the office should be default temporary leader) or because of Mackay's personal qualities.<sup>55</sup>

Butler failed, however, to get the Prime Minister and Cabinet to agree to such a contingency arrangement. He believed this was because they likely thought it not possible to provide in advance for the political circumstances of the moment and that it would be best for the Cabinet to discuss it as the situation arose and decide on what advice to offer the Queen.<sup>56</sup>

The issue was one that was explored again, in some depth, in 1991 by Andrew Turnbull, the Prime Minister's principal private secretary. He had been privy to the proceedings detailed above and decided to examine the options available in the event of the premier's demise. He identified three:

1. The appointment of someone as Prime Minister, but who would stand down when the process of electing a party leader was completed. The person would exercise the powers of the office, though there was some consideration given as to whether the person would receive the salary and pension of a Prime Minister.
2. The appointment of someone with the designation of Acting Prime Minister, to preside over the Cabinet and provide advice to the sovereign, but effectively just keep the wheels of government in motion.
3. The appointment of a senior minister to preside over Cabinet, but without the title of Prime Minister. The person would be acting Prime Minister in effect, but not in name.

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<sup>55</sup> Lord Turnbull to author, interview, 31 October 2007.

<sup>56</sup> Lord Butler of Brockwell to author, undated. See also Constitution Committee, House of Lords, *The Cabinet Manual*, 12<sup>th</sup> Report, Session 2010-11, HL Paper 107, Q66, p. 20.

As Turnbull recognised, the distinction between the second and third categories was not great and was primarily a matter of nomenclature. That between the first and second category was more significant. Appointing someone as Prime Minister would mean that they would enjoy the full powers inherent in the office and put their constitutional authority beyond doubt. It would also mean that he or she would be entitled to the pension and other benefits accorded the holder of the office<sup>57</sup> and not just the salary during the short tenure in the post. By being designated as Acting Prime Minister, they would not subsequently receive the perquisites enjoyed by former Prime Ministers, nor be included in the list of those who had held the office. It would also be clear, as Turnbull indicated, that they were essentially fulfilling the task of keeping government running until a new party leader was elected and not engaging in major policy initiatives or taking decisions with lasting consequences, other than in a national emergency. Turnbull took the view that the name of the minister to fulfil the temporary role needed to be agreed by the Cabinet, with that person then being recommended to the Crown.

As we have seen, he returned to the issue in 2003, but no further action was undertaken. However, throughout this period, the Cabinet Office appeared unaware that a framework for what action should be taken had been agreed some years before. Detailed thought had already been given to what should be done in the event of the demise of a Conservative Prime Minister.

### *The Charteris Memorandum*

The events outlined above were not the first or the only occasions that consideration was given to what to do should the Prime Minister die, in conditions where the party in government elected its leader. The first occasion on which discussions took place occurred following the change of rules in

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<sup>57</sup> The benefits, though, are now less generous than was previously the case. *Ex officio* pensions paid out of the Consolidated Fund to the Prime Minister, Lord Chancellor and Speaker of the House of Commons were ended by the Public Service Pensions Act 2013.

1975 for electing the Conservative leader. The Labour Party in opposition in 1963 had witnessed the sudden death of its leader, Hugh Gaitskell, in unusual circumstances,<sup>58</sup> but that had not given rise to reflection as to what would have happened had Gaitskell been Prime Minister. Under Labour Party rules, where the party is in government and the leader becomes ‘permanently unavailable’, ‘the Cabinet shall in consultation with the National Executive Committee appoint one of its members to serve as party leader until a ballot... can be carried out’. These rules had never needed to be tested. In Opposition, there are rules in place for an acting Leader, who takes charge while a leader is elected. There was thus no hiatus in leadership. The focus was on the contested election, not hypothetical constitutional questions.

The new rules agreed in 1975 for the election of the Conservative Party leader were somewhat rushed. They were drawn up while the party was in opposition. They provided for the annual election of the leader. No stipulation was made that this was to apply only in opposition. The implications of this only became clear when the party was returned to office in 1979 and there was talk of the Prime Minister, Margaret Thatcher, being challenged for the leadership in 1981. Nor did the rules cover what would happen in the event of the death or incapacity of a leader.

This lacuna in the rules appears to have been spotted not in Downing Street but in Buckingham Palace. The Queen’s Private Secretary, Sir Martin Charteris, was described as brilliant and innovative,<sup>59</sup> and very protective of the reputation of the Queen. On 21 July 1977, a private meeting took place between Charteris, Edward du Cann, the Chairman of the Conservative 1922 Committee, and Charles Morrison, the Vice-Chairman of the 1922 Committee. As Chairman of the 1922

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<sup>58</sup> Philip M. Williams, *Hugh Gaitskell: A Political Biography* (London: Jonathan Cape. 1979), pp. 760-3.

<sup>59</sup> Robert Hardman, *Our Queen* (London: Hutchinson, 2011), p. 191. Hardman cites the Queen’s Press Secretary, Ron Allison, as describing him as ‘the wisest man I ever met’.

Committee, du Cann was responsible for the arrangements governing an election contest.<sup>60</sup> Given that there was no reason why the officers of the 1922 Committee would seek a meeting with the Queen's Private Secretary to discuss the constitutional implications of the party's rules for electing a leader, the initiative would appear to have come from Charteris. That he should be proactive in this way is all the more notable given the demands made of him in the Queen's Silver Jubilee year. A note of the discussion was drawn up to provide a reference for the future.<sup>61</sup>

It was agreed that how the Conservative Party elected its leader 'could not in any circumstances be the concern of the sovereign, except academically, unless this affected the Constitutional position'. The election of a leader in Opposition could not give rise to any constitutional problem. The election of a leader when in government was a different matter 'and needed careful consideration'. In the case of a Prime Minister who decided to retire, it would be necessary for him to remain in office during the period of the election. 'There was a precise analogy with the retirement of Sir Harold Wilson in 1976. He remained in office as Prime Minister during the interval of three weeks while the election of Mr Callaghan took place among members of the Parliamentary Labour'. The note then continues:

In the event (for example) of the death of a Conservative Prime Minister, problems would at once arise. The Sovereign and the State must not be left in a position over a few weeks where there is not a Head of Government. On the other hand, the Sovereign would not wish to invite a leading figure in the Conservative Party to become Prime Minister before the election was held.

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<sup>60</sup> See Philip Norton, *The Voice of the Backbenchers. The 1922 Committee: the first 90 years, 1923-2013* (London: Conservative History Group, 2013), pp. 19, 253.

<sup>61</sup> *Procedure for the Election of a Leader of the Conservative Party. Note of a Meeting held on July 21, 1977.* Thatcher MSS (Churchill Archive Centre) THCR 2/6/2/106.

It was agreed that the most likely course of events would be for the Sovereign, in these circumstances, to invite a respected figure in the Conservative Party, who could not possibly be considered as a candidate for election as Leader of the Party, to assume this role pending the completion of the election procedure. The election complete, the Sovereign would then almost certainly invite the new Leader to become Prime Minister. (The words ‘almost certainly’ are deliberately meant to indicate that there is no wish to derogate from the Sovereign’s Constitutional discretion.)

The holders of the various State Offices would be considered to act as a temporary Prime Minister during the Election period: it might be that the Lord Chancellor of the day might be the most suitable candidate.

The note concludes by recording agreement that the Chairman and officers of the 1922 Committee would be immediately available for consultation by the Sovereign’s advisers, and would almost certainly be consulted.

This record of the meeting was approved by the officers and the executive of the 1922 Committee at a meeting on 17 November. It was circulated to the party leader, the leader of the party in the Lords, the chief whips in the two Houses, the chairman of the party, and the chairman of the executive of the party’s National Union.

Even before the election of party leaders by the entire party membership, there was thus recognition that the time taken to elect a leader when the party is in office creates a gap in leadership that could not be left unfulfilled. It is also notable that this appears to be the sole reason for the meeting. There was recognition that how the party elected its leader was a matter solely for it, hardly therefore the basis for discussion. The sole issue was when election affected the constitutional position. The death

of a Prime Minister is cited as an example of how it could be affected, but it is not clear that there were any other examples and what was agreed was exclusive to that eventuality.

### **The principles for appointment**

Although the Cabinet Secretaries who addressed the issue of what to do in the event of the death of the premier were unaware of the Charteris memorandum, their thoughts essentially reinforced its key points. There are three conclusions to be drawn from the record of the Charteris meeting and the reflections of Armstrong, Butler and Turnbull.

The first, and constitutionally the most significant, is recognition that a temporary Prime Minister would be appointed. There is no precedent for such a position, but there is no bar to it either. If the sovereign wishes to invite someone to be head of her government on a temporary basis, that is within her prerogative. The appointment of a temporary Prime Minister avoids repeating the situation in 1957 and 1963, the Queen making a decision that was in effect binding on the Conservative party as to who was to lead it. The Charteris memorandum accepted that the appointment of an interim premier was the most practical way of accommodating the need to have a Prime Minister while the party of government elected a new leader. Armstrong, Butler and Turnbull each saw it as the way to deal with the problem. Indeed, although Turnbull explored the possibility of someone chairing Cabinet without ‘kissing hands’ as Prime Minister, all three took the view that someone would have to assume the role of Prime Minister on an interim basis.

The second is that the person invited to head the government temporarily must not be a candidate for election as leader. In short, the option canvassed by Brazier – the appointment of the Deputy Prime Minister or number two in the Cabinet ranking, who may or may not be a candidate – is ruled out. Again, this was part of the Charteris memorandum and was part of Robin Butler’s consideration of how to proceed should it be necessary. Turnbull also took the view that the person appointed should

not be a candidate for leadership.<sup>62</sup> It is also implicit in Armstrong's recommendation of Willie Whitelaw, a senior member of the Cabinet and effectively deputy Prime Minister, but someone who was no longer considered a contender for the party leadership.

The third is that, despite an attempt to have a procedure in place, some ambiguity remains as to who would be chosen as temporary Prime Minister. The Charteris note records that the Lord Chancellor of the day may be the most suitable candidate. As we have seen, Butler put forward the name of the then Lord Chancellor, Lord Mackay of Clashfern, as the person most appropriate to serve. Taking that as the default position would provide some certainty, but that was ended by the provisions of the Constitutional Reform Act 2005 under which the Lord Chancellor need no longer be a senior lawyer and, crucially, a peer. The Lord Chancellor's post may be held by a member of the House of Commons and one who is a possible contender for election as party leader. The only peer to serve in Cabinet normally now is the Leader of the House of Lords. However, even the Leader of the Lords may not necessarily be the automatic default position. In 2014, the new Leader of the House, Baroness Stowell, was not made a member of the Cabinet. There was thus no peer in Cabinet who could act as temporary premier. In the same year, the House of Lords Reform Act enabled peers to resign their seats in the Lords.<sup>63</sup> It was thus possible for a peer in Cabinet to do what Lord Home did in 1963 and give up their place in the Upper House to seek election to the Commons.

The third point removes a degree of certainty as to who the person would be. The principle that it should be a senior member of the Cabinet, who is not a contender for the leadership provides, nonetheless, a basis for deciding who should be selected. The choice would be on the basis of who fitted that description at the time rather than on who held a specified office. The absence of a designated post-holder, however, leaves open the issue as to who or which body would recommend

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<sup>62</sup> Lord Turnbull to author, interview, 31 October 2007.

<sup>63</sup> House of Lords Reform Act 2014, s1.



the name to the Queen. There are two views. Armstrong's view was that, through the Queen's Private Secretary, advice would have been taken from leading figures in the Conservative Party.<sup>64</sup> Though the Charteris memorandum is not explicit on the point, the implication is that the Queen would seek advice from different sources. This gains further credence from the fact that, following the Brighton bombing, Armstrong discussed the issue with Charteris, who concurred with Armstrong's view as to how the situation would likely have been handled. Armstrong was of the view that it would not be appropriate for the Cabinet – or, in the case of the Labour Party, the Cabinet in conjunction with the party's National Executive Committee – to agree a name. 'I can think of no constitutional precedent for that'. There was also a practical objection: 'there would not be the time for all that, and there might well be no consensus'.<sup>65</sup>

Turnbull, on the other hand, took the view that it would be for the Cabinet to agree a name and put it forward to the Queen. The Cabinet Secretary could offer advice, but it would be a matter for the Cabinet.<sup>66</sup> Butler assumed that the Queen would send for a member of the Cabinet – 'someone whom the Cabinet had agreed on'.<sup>67</sup> This would have the merit of keeping the Queen from political controversy. Formally, the prerogative would remain unfettered, but in practice it would be clear as to who was making the recommendation, akin to party negotiators in May 2010 reaching agreement on a coalition government, the Queen being kept informed but not being drawn into the process. She sent for David Cameron once agreement had been reached.

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<sup>64</sup> Lord Armstrong of Illminster to author, 16 August 2007. Constitution Committee, House of Lords, *The Cabinet Manual*, 12<sup>th</sup> Report, Session 2010-11, HL Paper 107, Q67, p. 21.

<sup>65</sup> Lord Armstrong of Illminster to author, 16 August 2007.

<sup>66</sup> Lord Turnbull to author, interview, 31 October 2007.

<sup>67</sup> Constitution Committee, House of Lords, *The Cabinet Manual*, 12<sup>th</sup> Report, Session 2010-11, HL Paper 107, Q66, p. 20.

Had Prime Minister Gordon Brown died in office, Armstrong took the view that two or three senior Cabinet ministers and the Government Chief Whip, as well as former party leaders, would have been consulted by the Queen's private secretary.<sup>68</sup> However, when the Prime Minister's spokesman was asked by a journalist in June 2007 'who would become Prime Minister should Mr Brown fall under a bus' he basically restated, though not precisely, the rules of the Labour Party. It would, he said, 'be the decision of the Cabinet, which would be subject to approval by the NEC', adding – with a notable insensitivity to the prerogative – 'and then the Queen would then call for that person'.<sup>69</sup>

Depending on circumstances, there may be a factor of time or, indeed, availability if some Cabinet ministers as well as the Prime Minister are caught by a terrorist outrage, but it would then presumably be a matter for the remaining Cabinet ministers to agree a name to put forward. The time factor would apply also should the alternative route of seeking advice from leading figures in the party be followed.

## **Conclusion**

The question of what happens in the event of the death of the Prime Minister is a serious one.

Although largely neglected in the scholarly literature, those with a particular, but politically detached, interest in maintaining the Queen's Government, and ensuring the neutrality of the monarch, have considered and essentially concurred on two basic propositions. First, in the event of the death of the Prime Minister, it would be appropriate to appoint an interim Prime Minister. Second, that the person appointed should be a senior figure who is not a contender for the party leadership. There remains the outstanding issue of who should identify this senior figure and put forward a name to the Queen. The options identified (the Queen's Private Secretary seeking advice, the Cabinet putting forward a name)

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<sup>68</sup> Lord Armstrong of Illminster to author, 16 August 2007.

<sup>69</sup> Briefing from the Prime Minister's Spokesman, Afternoon press briefing, 28 June 2007.

are not mutually exclusive, but there would be obvious scope for controversy if the sovereign sought and acted on advice that ran counter to that proffered by the Cabinet. If it were to be accepted that the Cabinet would make a recommendation, then the process by which the government of the United Kingdom retains a designated head, albeit on a temporary basis, would be in place in the event of the demise of the PM. That would satisfy the two developments – an increasingly neutral monarchy and the election of party leaders – that have given rise to the conundrum.